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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Patent & Trademark Office
Appl. No. : 10/720,948
Appellant : Paul R. Gagnon
Filed : November 24, 2003
TC/A.U. : 3711
Examiner : Mitra Aryanpour

Confirmation No. 5271

Docket No. : 03-482
Customer No. : 34704

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313

APPEAL BRIEF

Sir:

This is an appeal to the Board of Patent Appeals and Interferences from the final rejection of claims 1 - 18, dated May 10, 2005, made by the Primary Examiner in Group Art Unit 3711.

REAL PARTY IN INTEREST

The real party in interest is the inventor Paul R. Gagnon.

RELATED APPEALS AND INTERFERENCES

There are no other prior and pending appeals, interferences or judicial proceedings known to Appellant, or Appellant's legal representative, which may be related to, directly affect, or be directly affected by or have a bearing on the Board's decision in the pending appeal.

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STATUS OF CLAIMS

Claims 1 - 18 are pending in the application and are on appeal. An appendix containing the claims on appeal is attached hereto.

STATUS OF AMENDMENTS

An amendment after final rejection was filed subsequent to the final rejection. However, the Examiner in an advisory action dated August 29, 2005 denied entry of the amendment after final rejection for the purposes of appeal.

A second amendment after final is being filed contemporaneously with this Appeal Brief. The second amendment after final is directed solely to drawing corrections and amendments to the specification which the Examiner has previously approved in the advisory action.

SUMMARY OF CLAIMED SUBJECT MATTER

The claims on appeal relate to a sports vision training device (10) (see FIGS. 1 - 3, 4A, 4B, 5 and 6) for directing an individual's field of vision up and toward the field of play and for restricting the individual's field of vision with regard to a sports object, such as a ball, puck, etc., being controlled by the individual. See page 1, lines 4 - 8 of the specification.

As set forth in independent claim 1, the sports vision training device (10) comprises a piece of material having a thickness (H) sufficient to interfere with an individual's ability to look in a specific direction at a sporting object being controlled by the individual. See page 4, paragraph 0022. The piece of material has an adhesive coating or layer (22) (see FIG. 4A) for positioning the piece of a material on a portion of an individual's face so that the piece of material interferes

with the individual's ability to look at the sporting object while attempting to control the sporting object due to the thickness. See page 4, paragraph 0021, of the specification.

As set forth in claim 2, the piece of material has a thickness (H) sufficient to direct the individual's vision up and toward the field of play and players on the field of play. See page 4, paragraph 0022, of the specification.

As set forth in claim 3, the piece of material (20) is formed from an open-cell foam material. See page 4, lines 5 - 9, of the specification.

As set forth in claim 4, the adhesive coating or layer (22) includes means for absorbing moisture and for transferring the moisture from a surface of an individual's skin to the piece of material to allow the moisture to evaporate. See page 4, paragraph 0021, of the specification.

As set forth in claim 5, the moisture absorbing and transferring means comprises a hydrocolloidal material incorporated into the adhesive layer. See page 4, paragraph 0021, of the specification.

As set forth in claim 6, the piece of material has an upper surface and the upper surface is intermittently grooved (30) (see FIG. 6) (see page 4, paragraph 0023, of the specification), or with a narrow stem (40) (see FIG. 5) (see page 4, paragraph 0024, of the specification) at the base of which is the adhesive, to permit momentary glances at the sports object.

As set forth in claim 7, the piece of material may have written indicia on an upper surface. See page 4, paragraph 0025, of the specification.

As set forth in claim 8, the piece of material may have a logo on an upper surface. See page 4, paragraph 0025, of the specification.

As set forth in claim 9, the sports vision training device is disposable. See page 2, paragraph 0007, of the specification.

Claim 10 is an independent claim directed to a system for training an individual encouraging them to look up and forward while playing a sport without looking down at an object being controlled by the individual. The system comprises a pair of potentially disposable view restricting members (10). Each member (10) is adhesively applied to one of the cheeks under an eye of the individual. Each member (10) has a thickness (H) sufficient to interfere with the individual's vision if the individual attempts to look down and sufficient to encourage the individual to look in an up and forward direction towards a field of play and at least one player on the field of play. See FIGS. 1 - 3, 4A, 4B, 5 and 6 of the drawings and page 2, paragraph 0010, of the specification.

As set forth in claim 11, each member has a first layer (20) formed from an open-cell foam material. See page 4, paragraph 0021, of the specification.

As set forth in claim 12, each member has an adhesive coating or layer (22) for holding the member to a respective cheek of the individual. The adhesive coating or layer abuts a surface of the first layer. See FIG. 4A of the drawings and page 4, paragraph 0021, of the specification.

As set forth in claim 13, the adhesive coating or layer (22) contains a hydrocolloidal material for absorbing moisture and for transferring the moisture from a surface of a respective cheek to the first layer for evaporation into the atmosphere. See page 4, paragraph 0021, of the specification.

As set forth in claim 14, each member may have an upper surface and intermittently spaced grooves (30) in the upper surface (see FIG. 6 of the drawings and page 4, paragraph 0023,

of the specification), or with a narrow stem (40) (see FIG. 5 of the drawings and page 4, paragraph 0023, of the specification) at the base of which is the adhesive, for allowing momentary glances downwardly at the sports object being controlled by the user.

As set forth in claim 15, the system further comprises vision restriction devices (10) attached to the individual's face along side each eye to restrict the individual's peripheral vision. See page 4, paragraph 0026 of the specification.

As set forth in claim 16, each of the vision restriction devices comprises a first layer (20) formed from an open cell material and a second adhesive coating or layer (22) for adhering the vision restriction device to the individual's face. See page 4, paragraphs 0021 and 0026, of the specification.

As set forth in claim 17, the adhesive coating or layer (22) has a hydrocolloidal material incorporated therein. See page 4, paragraph 0021, of the specification.

Claim 18 is an independent claim and is directed to a method for training an individual playing a sport. The method comprises the steps of providing at least one member (10) having an adhesive coating or layer (22) and a thickness (H) sufficient to interfere with the individual's field of vision and positioning the at least one member (10) on at least one cheek under an eye of the individual so that the thickness interferes with the individual's ability to look downwardly at a sports object being controlled by the individual and to restrict the individual's field of vision to looking forward up and towards a field of play and at least one person on the field of play. See page 2, paragraph 0011, of the specification.

The sports training device of the present invention is advantageous in that it is lightweight and can be easily

applied. Further, it absorbs moisture from the wearer's skin and allows it to evaporate to the environment. Still further, the use of the hydrocolloidal material in the adhesive layer helps prevent rapid loss of adhesive strength and helps prevent skin rash or trauma to the skin upon removal of the device. Most importantly, the sports training device of the present invention encourages play with a desired head and eyes up orientation. See page 4, paragraph 0024, of the specification.

GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The grounds of rejection to be reviewed on appeal are as follows:

- (1) The rejection of claims 1 and 2 under 35 U.S.C. 102(b) as being anticipated by WO 96/32979 to Maged;
- (2) The rejection of claims 1 - 4, 6, 9 - 12, 14 - 16, and 18 under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 4,719,909 to Micchia et al.;
- (3) The rejection of claims 7 and 8 under 35 U.S.C. 103(a) as being unpatentable over Micchia et al.; and
- (4) The rejection of claims 5, 13, and 17 under 35 U.S.C. 103(a) as being unpatentable over Micchia et al. in view of U.S. Patent No. 4,951,658 to Morgan et al.

ARGUMENT

(a) *Patentability of Claim 1*

Claim 1 has been rejected on anticipation grounds over both the Maged and Micchia et al. patents. In order to anticipate a claim, the reference must expressly or inherently describe each and every limitation set forth in the claim. See *Verdegaal Bros., Inc. v. Union Oil Co.*, 814 F.2d 628, 631, 2 USPQ2d 1051,

1053 (Fed. Cir. 1987). An anticipating reference must describe the subject matter in the claim with sufficient clarity and detail to establish that the subject matter existed in the prior art and that such existence would be recognized by persons of ordinary skill in the field of the invention. See *In re Spada*, 911 F.2d 705, 708, 15 USPQ2d 1655, 1657 (Fed. Cir. 1990). Neither Maged nor Micchia is directed to a sports training device which comprises a piece of material having a thickness sufficient to interfere with an individual's ability to look in a specific direction at a sporting object being controlled by the individual. Nor does either reference teach or suggest positioning the piece of material on a portion of an individual's face so that said piece of material interferes with the individual's ability to look at the sporting object while attempting to control the sporting object. There is absolutely no reason for either the device shown in Maged or the device shown in Micchia et al. to have the claimed thickness or be positioned in the place specified in claim 1. Neither Maged nor Micchia et al. is directed to a device intended to interfere with a user's vision.

Maged is directed to tape members 101 and 102 for dilating nasal passages and for increasing the ease with which respiration may be carried out through the nose. The tape members 101 and 102 are stretched and adhered to the wearer's face below the eyes for dilating nasal concha. In fact, Maged is clear on page 2, lines 12 - 13, that the tape members are worn so as to avoid any obstacle to a comfortable wearing of goggles, sunglasses and the like. Maged is also clear that the tape members are placed between a location adjacent the nose just below the medial infra orbital region. See page 2, lines 26 - 27 of Maged. It is submitted that a tape member positioned in such

a location will not interfere at all with a wearer's downward vision. Still further, it should be noted that when applying the tape members, the inner end is first affixed to the user's face and then the tape member is stretched to dilate the nasal concha. It is submitted that the stretching of the tape member causes it to decrease in thickness. One of the things that Maged seeks to avoid is having the tape members be partially visible and therefore annoying to the wearer. See page 6, lines 23 - 24 of Maged.

Maged is totally silent as to the thickness of the tape members 101 and 102. Thus, it does not expressly anticipate the subject matter of claim 1. As for inherently having the claimed thickness, the Examiner has the burden of establish that the limitation is necessarily present and a person of ordinary skill in the art would recognize its presence. See *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999). Inherency may not be established by probabilities or possibilities. The mere fact that a certain result may result from a given set of circumstances is not sufficient. See *In re Oelrich*, 666 F.2d 578, 581, 212 USPQ 323, 326 (CCPA 1981). A review of the rejection shows that the Examiner has not met the requirements for establishing inherency. In particular, the Examiner has not set forth any technical reasoning as to why the missing thickness limitation is necessarily present and why one of ordinary skill in the art would recognize it as being necessarily present. It is submitted that the Examiner could not possibly set forth such a line of reasoning given the fact that Maged seeks to avoid having the tape members partially visible and annoying to wearers. If anything, one of ordinary skill in the art would conclude from a reading of Maged that the claimed limitation is not present.

For these reasons, claim 1 is allowable over Maged.

With respect to Micchia et al., this patent is directed to an under-eye light absorbing device (7) which is positioned on the zygomatic arch skin area adjacent to the lower side of the user's orbit. As pointed out in column 1, lines 13 and 14, this is the area known as the cheekbone. As set forth in column 2, lines 46, et seq. of Micchia et al., the device or patch (7) is generally kidney shaped. Micchia et al., in column 3, line 43, describe the patches as being "thin". Clearly, there is no disclosure in Micchia et al. of a sports training device having the claimed thickness. Thus, Micchia et al. does not expressly anticipate the claimed invention. As for inherently anticipating the claimed invention, the Examiner has not set forth any technical reason why the claimed thickness is necessarily present in Micchia et al. and why one of ordinary skill in the art would recognize it as being necessarily present. Since the Micchia et al. device is to be worn in sports such as baseball, football, tennis, golf, amongst others, Micchia et al. would not want the patch to have a thickness sufficient to interfere with a user's ability to look in a specific direction at a sporting object being controlled by the individual. It is submitted that one of ordinary skill in the art having the Micchia et al. disclosure before him would not conclude that the claimed thickness is present.

For these reasons, claim 1 is allowable over Micchia et al.

(b) Patentability of claims

2 - 4, 6, and 9

Claim 2 has been rejected as being anticipated by both Maged and Micchia et al. Claim 2 is directed to the piece of

material thickness sufficient to direct the individual's vision up and toward the field of play and players on the field of play. It is submitted that neither Maged nor Micchia et al. disclose the claimed thickness. As discussed above, neither reference would want their device to have such a thickness. Thus, it is submitted that claim 2 is not anticipated by either Maged or Micchia et al. As for the Examiner's inherency contention, the Examiner is wrong. The Maged reference is clear that it does not want to interfere with a user's vision. As for Micchia et al., they want their patch to be thin, not thick. The Examiner provides no reason why Micchia et al.'s patches inherently have a thickness which directs the individual's vision up and toward the field of play and players on the field of play. During an interview in the instant application, Applicant's attorney provided the Examiner with a specimen of a device similar to that described in Micchia et al. to demonstrate that the thickness is not sufficient to meet the limitations of claim 2. The specimen was left with the Examiner, but in the event that it has become separated from the file, another specimen is attached hereto in Appendix B.

Claim 3 stands rejected as being anticipated only by Micchia et al. It is submitted that this claim is allowable because Micchia et al. does not disclose the use of an open-cell "foam" material. Micchia et al., in column 2, lines 28 - 36, describes the material forming its body sheet layer 11. Micchia et al. does not specifically disclose the claimed material. Thus, claim 3 is not anticipated by Micchia et al. The Examiner has taken the position that common and well-known medical bandages are formed from open-cell foam material, but has shown no evidence in support of this.

Claim 4 is directed to the adhesive coating or layer including means for absorbing moisture and for transferring the moisture from a surface of an individual's skin to the piece of material. Micchia et al. does not disclose such a means in the adhesive coating or layer. Therefore, Micchia et al. does not anticipate the invention set forth in claim 4. The only thing that Micchia et al. says is that "[d]ue to the air permeability of the patches 7, the skin underlying each patch may breath the patches permit oxygen penetration to the skin and moisture is substantially released." (See column 3, lines 38 - 41.) There is no discussion of the adhesive coating or layer having any moisture absorbing means or moisture transferring means.

Claim 6 is allowable because Micchia et al. lacks both an upper surface which is intermittently grooved or a narrow stem at the base of which is the adhesive. In making this rejection, the Examiner has not pointed to any portion of Micchia et al. which discloses these limitations. FIG. 2 in Micchia et al. does not show a grooved surface. As for column 2, lines 46 - 55, of Micchia et al., there is no discussion in this portion of either an intermittently grooved upper surface or a narrow stem. A kidney shaped patch has no narrow portion. For these reasons, claim 6 is not anticipated by Micchia et al.

Claim 9 is allowable for the same reasons that claim 1 is allowable.

(c) Patentability of Independent

Claim 10

Claim 10 is directed to a system for training an individual encouraging them to look up and forward while playing a sport without looking down at an object being controlled by the

individual. The system comprises a pair of potentially disposable view restricting members. Each member is adhesively applied to one of the cheeks under an eye of the individual. Each member has a thickness sufficient to interfere with the individual's vision if the individual attempts to look down and sufficient to encourage the individual to look in an up and forward direction towards a field of play and at least one player on the field of play.

Claim 10 stands rejected as being anticipated by Micchia et al. As noted above in connection with claim 1, which remarks are incorporated by reference herein, Micchia et al. does not disclose, either expressly or inherently, the claimed thickness. Micchia et al. has no interest in providing a patch having a thickness sufficient to interfere with the individual's vision if the individual attempts to look down and sufficient to encourage individual to look in an up and forward direction towards a field of play and at least one player on the field of play. It is submitted that when playing sports such as golf, tennis, and football, one needs to be able to look downwardly at the ball. The rejection made by the Examiner is deficient in that the Examiner has not provided any reasoning as to why the claimed thickness is inherently present in Micchia et al. and why one of ordinary skill in the art would recognize it as being present in the reference.

(d) Patentability of Claims

11, 12, and 14 - 16

Claim 11 is directed to the member having a first layer formed from an open cell foam material. The same comments which applied to claim 3 are equally applicable here. Thus, they are

incorporated by reference herein. Claim 11 is allowable for the same reasons that claim 3 is allowable over Micchia et al.

Claim 12 is allowable for the same reasons that claims 10 and 11 are allowable.

Claim 14 is allowable because it cannot be anticipated by Micchia et al. Claim 14 depends from claim 13, which has not been rejected as being anticipated by Micchia et al. Claim 14 is further allowable for the same reasons that claim 6 is allowable, which reasons are incorporated by reference herein. Micchia et al. fails to disclose the claimed upper surface being intermittently grooved or the narrow stem.

Claim 15 is directed to the system further having vision restriction devices attached to an individual's face along side each eye to restrict the individual's peripheral vision. Claim 15 is allowable over Micchia et al. because Micchia et al. does not disclose the claimed vision restriction devices attached to an individual's face *along side each eye to restrict the individual's peripheral vision*. It is submitted that the Micchia et al. patches are not placed along side the eyes and are incapable of restrict an individual's peripheral vision. FIG. 1 in Micchia et al. shows the patches (7) to be below the eye, not along side the eye.

Claim 16 depends from claim 15 and is allowable over Micchia et al. for the same reason as claim 15. Claim 16 is further allowable because Micchia et al. does not disclose the claimed open cell foam material.

(e) *Patentability of Independent*

Claim 18

Claim 18 is directed to a method for training an individual playing a sport. The method comprises the steps of providing at least one member having an adhesive coating or layer and a thickness sufficient to interfere with the individual's field of vision and positioning the at least one member on at least one cheek under an eye of the individual so that the thickness interferes with the individual's ability to look downwardly at a sports object being controlled by the individual and to restrict the individual's field of vision to looking forward up and towards a field of play and at least one person on the field of play.

The Micchia et al. patent is not directed at all to a method for training an individual to play a sport. The only thing that Micchia et al. is directed to is providing an under eye light absorbing device. Micchia et al. does not disclose either step of the claimed method. Micchia et al. does not disclose providing at least one member having a thickness sufficient to interfere with the individual's field of vision. Micchia et al. also does not disclose positioning the at least one member under the eye of an individual so that the thickness interferes with the individual's ability to look downwardly at a sports object being controlled by the individual and to restrict the individual's field of vision to looking forward up and toward a field of play and at least one person on said field of play.

(f) Patentability of Claims

7 and 8

Claims 7 and 8 stand rejected on obviousness grounds over Micchia et al. The Examiner contends that at the time the invention was made, it would have been an obvious matter of design choice to include a logo or indicia on the upper surface of the piece of material. Appellant believes that one of ordinary skill in the art would not be motivated to place a logo or indicia on the upper surface of Micchia et al.'s patches. The purpose of the Micchia et al.'s patch is to absorb light. Thus, a light absorbing coating 12 is provided. It may be a coloring material or dye which permeates the body. In column 2, lines 39 - 41, it is said that the light absorbing surface 12 may comprise a non-reflective, such as black, coating uniformly applied over the surface of the sheet 11. It is submitted that if one were to put indicia or a logo on the Micchia et al. patch, such indicia or logo would interfere with the light absorbing function of Micchia et al.'s patches. Thus, one of ordinary skill in the art would not be motivated to modify Micchia et al. as suggested by the Examiner.

(g) Patentability of Claims

5, 13 and 17

Claims 5, 13, and 17 are each directed to the use of a hydrocolloidal material incorporated into the adhesive layer. Appellant concedes the Morgan reference being relied upon by the Examiner teaches incorporating hydrocolloidal material into the adhesive layer. Despite this, claims 5, 13, and 17 are believed to be allowable over the combination of Micchia et al. and Morgan.

Claim 5 is allowable for the same reasons as claims 1 and 4. Morgan does not overcome the aforenoted deficiencies of Micchia et al.

Claim 13 is allowable for the same reasons that claims 10 - 12 are allowable. Morgan does not overcome the aforenoted deficiencies of Micchia et al.

Claim 17 is allowable for the same reasons that claims 10, 15, and 16 are allowable. Morgan does not overcome the aforenoted deficiencies of Micchia et al. In particular, Morgan does not disclose a vision restriction device attached to an individual's face along side each eye to restrict the individual's peripheral vision. In fact, Morgan relates to an eye patch which obstructs a wearer's vision in its entirety.

CONCLUSION

For the foregoing reasons, the Board is hereby requested to reverse the rejection of claims 1 - 18 and remand the application to the Primary Examiner of allowance and issuance.

FEES

A check in the amount of \$250.00 is enclosed herewith to cover the Appeal Brief fee. Should the Director determine that

an additional fee is due, he is hereby authorized to charge said fee to Deposit Account No. 02-0184.

Respectfully submitted,

Paul R. Gagnon

By Barry L. Kelmachter

Barry L. Kelmachter
BACHMAN & LAPOINTE, P.C.
Reg. No. 29,999
Attorney for Appellant

Telephone: (203) 777-6628 ext. 112
Telefax: (203) 865-0297
Email: docket@bachlap.com

IN TRIPPLICATE

Date: August 10, 2005

I, Nicole Motzer, hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: "Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313" on August 10, 2005.

Nicole Motzer

APPENDIX A - CLAIMS APPENDIX

1. A sports vision training device comprising:

a piece of material having a thickness sufficient to interfere with an individual's ability to look in a specific direction at a sporting object being controlled by the individual; and

said piece of material having an adhesive coating or layer for positioning said piece of material on a portion of an individual's face so that said piece of material interferes with said individual's ability to look at said sporting object while attempting to control said sporting object due to said thickness.

2. A sports vision training device according to claim 1, wherein said piece of material has a thickness sufficient to direct the individual's vision up and toward the field of play and players on said field of play.

3. A sports vision training device according to claim 1, wherein said piece of material is formed from an open-cell foam material.

4. A sports vision training device according to claim 1, wherein said adhesive coating or layer includes means for absorbing moisture and for transferring said moisture from a surface of an individual's skin to the piece of material to allow the moisture to evaporate.

5. A sports vision training device according to claim 4, wherein said moisture absorbing and transferring means comprises a hydrocolloidal material incorporated into said adhesive layer.

6. A sports vision training device according to claim 1, wherein said piece of material has an upper surface and said upper surface is intermittently grooved, or with a narrow stem at the base of which is the adhesive, to permit momentary glances at said sports object.

7. A sports vision training device according to claim 1, wherein said piece of material has written indicia on an upper surface.

8. A sports vision training device according to claim 1, wherein said piece of material has a logo on an upper surface.

9. A sports vision training device according to claim 1, wherein said device is disposable.

10. A system for training an individual encouraging them to look up and forward while playing a sport without looking down at an object being controlled by said individual, said system comprising:

a pair of potentially disposable view restricting members;

each said member being adhesively applied to one of the cheeks under an eye of said individual;

and each said member having a thickness sufficient to interfere with said individual's vision if said individual

attempts to look down and sufficient to encourage said individual to look in an up and forward direction towards a field of play and at least one player on said field of play.

11. A system according to claim 10, wherein each said member has a first layer formed from an open-cell foam material.

12. A system according to claim 11, wherein each said member has an adhesive coating or layer for holding said member to a respective cheek of said individual, said adhesive coating or layer abutting a surface of said first layer.

13. A system according to claim 12, wherein said adhesive coating or layer contains a hydrocolloidal material for absorbing moisture and for transferring said moisture from a surface of said respective cheek to the first layer for evaporation into the atmosphere.

14. A system according to claim 13, wherein each said member has an upper surface and intermittently spaced grooves in said upper surface, or with a narrow stem at the base of which is the adhesive, for allowing momentary glances downwardly at the sports object being controlled by the user.

15. A system according to claim 10, further comprising vision restriction devices attached to an individual's face along side each eye to restrict the individual's peripheral vision.

16. A system according to claim 15, wherein each said vision restriction device comprises a first layer formed from an open

cell material and a second adhesive coating or layer for adhering the vision restriction device to the individual's face.

17. A system according to claim 16, wherein said adhesive coating or layer has a hydrocolloidal material incorporated therein.

18. A method for training an individual playing a sport, said method comprising the steps of:

providing at least one member having an adhesive coating or layer and a thickness sufficient to interfere with said individual's field of vision; and

positioning said at least one member on at least one cheek under an eye of said individual so that said thickness interferes with the individual's ability to look downwardly at a sports object being controlled by the individual and to restrict said individual's field of vision to looking forward up and towards a field of play and at least one person on said field of play.

APPENDIX B - EVIDENCE APPENDIX



APPENDIX C - RELATED PROCEEDINGS APPENDIX

Not applicable